No. 87-1379

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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TABLE OF AUTHORITIES

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Exemptions 6 and 7(C) of the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. IV) 552(b)(6) and (7)(C), have been generally understood to call for a judicial balancing of the public interest in disclosure of particular records against the privacy interests of the subject of those records. The district judge and the dissenting panel member in the court of appeals both concluded that the privacy interests of Charles Medico outweigh any public interest in disclosure (Pet. App. 57a, 59a (district court); *id.* at 49a (Starr, J., dissenting)).[1] The court of appeals

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[1] The district judge reviewed our in camera submission of any records at issue and adhered to this conclusion (Pet. App. 59a). Although the court of appeals was less explicit about whether it performed such a review, it appears that the members of the panel examined our in camera submission (see Pet. 10 n.3) – although the majority regarded the content of that submission as essentially irrelevant to the issues before it.

majority reversed, expressly adopting approaches to both the "privacy" and "public interest" components of the balance that are important departures from settled law (see *id.* at 23a, 26a, 38a (criticizing district court and dissent for purporting to be able to conduct the conventional balancing)). In major part, even respondents decline to defend the approach taken by the majority (see Br. in Opp. 5-6, 18). Instead, they claim that the errors in the analysis below "did not affect the result in this case" (*id.* at 6) and are unlikely to be repeated. But they do not succeed in obscuring the major importance of this case.

1. Respondents suggest that this is not an appropriate case to consider the court of appeals' broad rulings on the meaning of "privacy" and "public interest" because (they say) on the facts of this case an order compelling disclosure is unassailable. Like the two judges who *did* consider the specific facts of this case, we disagree.

Respondents claim the right to all records of *arrests* of Charles Medico, no matter how old, no matter what the charge, and no matter whether any prosecution ensued,[2] so long as the records would be publicly available somewhere to a person who knew where and how to ask for them. The government does not categorically deny respondents' right to arrest records. For example, we recognize that, in light of Charles Medico's connection to Representative Flood, there could well be a legitimate public interest, outweighing any privacy interest, in *some* kinds of crimes for which Medico might have been arrested, especially if prosecution ensued.[3] We have,

[2] Respondents' assertion (Br. in Opp. 11) that the court of appeals "confined its holding to information that * * * concerns official acts occurring in the course of a criminal prosecution" is simply wrong.

[3] Contrary to respondents' implication, we have never withheld financial crime information, nor did we "belatedly * * * recognize[] the public interest warranting disclosure of * * * 'financial crime' information" (Br. in Opp. 4). As soon as respondents made specific reference to "a record of bribery, embezzlement or other financial crime" (C.A. App. 137A; see also *id.* at 321 n.1), we stated that we were *not* withholding any such information. We had no earlier occasion to make such a statement. Nor did we argue below that the public cannot have any legitimate interest in any information other than "financial crime" information. We have had no occasion to join issue on whether "many 'non-financial' crimes (such as perjury or making false statements to a government agency) would be just as important as 'financial' crimes" (Br. in Opp. 18), because respondents never mentioned perjury or false-statement offenses in the lower courts. Any actual withheld records were available to the courts below (as they are to this Court). It is nondisclosure of those actual records—not any "arbitrar[y] refus[al] to disclose information about *any* other crimes" than financial ones (*id.* at 17 (emphasis added))—that the judges who conducted a conventional balancing were willing to uphold (Pet. App. 49a, 57a, 59a).

however, contended that the contents of any records that actually exist are so unrelated to any public business that any public interest in them is outweighed by a private citizen's "cherish[ed] * * * notion that our past mistakes will be forgotten, and * * * distaste for the widespread publication of such information as arrest records" (Pet. App. 19a).[4] We have submitted any actual records to the district court to make that weighing, and it did so and ruled in our favor. The issue in this case is whether it should have engaged in the weighing process at all.

[4] A hypothetical example based on the record of this case can be used to illustrate the point. The "rap sheet" of William Medico, who is deceased, shows that he was arrested in Scranton, Pennsylvania, on or about February 3, 1931, for an alleged violation of the National Prohibition Act but that he was then released (C.A. App. 24). The rap sheet reflects no further action on this charge. If such a charge appeared on the records of Charles Medico, a living person, we do not see how there could be any public interest that justified the invasion of privacy that would result from releasing this arrest record to "any person" (5 U.S.C. 552(a)(3)), even if this 57-year-old arrest record was publicly available at its source.

2. Respondents do seek to defend the court of appeals' notion that there virtually cannot be more than a negligible privacy interest in a "public record." Respondents' defense rests, however, on misreading decisions of this Court and on other errors.

a. Respondents assert that in *Paul* v. *Davis*, 424 U.S. 693 (1976), this Court "squarely rejected Davis's claim that the disclosure of his arrest on shoplifting charges invaded his privacy" (Br. in Opp. 6-7). This assertion is a mere play on words. What the Court held in *Davis* was that Davis had no *constitutional* privacy right that *forbade* disclosure of his arrest (424 U.S. at 713). No one is claiming that Charles Medico has any such constitutional right. We contend only that he has a privacy interest that should be given appropriate weight under a statute that calls on courts to determine when disclosure is "unwarranted" (5 U.S.C. (Supp. IV) 552(b)(7)(C)).

b. In *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 603 n.5 (1982), this Court said that "the fact that citizenship is a matter of public record somewhere in the Nation cannot be decisive" of the privacy interest of the individual. The Court's statement was a response to an argument, vigorously made,[5] that FOIA necessarily compelled disclosure of a foreign-born person's United States citizenship status, because under 8 U.S.C. 1447 and 1448 that person, if a citizen, would have been naturalized "in open court," so there could be nothing "private" about citizenship. Respondents now

[5] See Brief in Opposition at 2-5, *United States Dep't of State* v. *Washington Post Co.*, *supra;* Brief for the Respondent at 24-31, *United States Dep't of State* v. *Washington Post Co.*, *supra;* Brief *Amici Curiae* of the American Newspaper Publishers Association, et al., at 5-6, 9-10, *United States Dep't of State* v. *Washington Post Co.*, *supra*. Respondent Reporters Committee joined the amicus brief in the *Washington Post* case.

suggest (Br. in Opp. 10) that the Court's statement applies only to records other than judicial or quasi-judicial records, but the facts of *Washington Post* belie that suggestion. In fact, the Court's footnote identified "past criminal convictions" as one sort of information subject to a balancing test despite being a matter of public record (456 U.S. at 603 n.5).[6]

The clear lesson of *Washington Post* is that being a "matter of public record" is but one factor bearing on an inquiry to be made "under all the circumstances of a given case" (456 U.S. at 603 n.5). The fact that "the information is difficult to locate" is one of the circumstances deserving consideration. *Washington Post Co.* v. *United States Dep't of State*, 647 F.2d 197, 200 (D.C. Cir. 1981) (Lumbard, J., concurring), rev'd, 456 U.S. 595 (1982). Other circumstances that deserve consideration include the age and nature of any arrest, charge, or offense and the unique privacy implications of the release of "cumulative, indexed, computerized information" (Pet. App. 48a (Starr, J., dissenting)). The position of respondents that there is necessarily "only 'a low-level privacy interest in *criminal records*' which are '*a matter of public record*' " (Br. in Opp. 6 (quoting Pet. App. 19a, 20a) (emphasis added by respondents)) misconceives *Washington Post*.

c. This is not a case about access to court proceedings, access to court records, or publication of court records once obtained (see Br. in Opp. 7-9; cf. Pet. 19 n.9). As far as we know, respondents were not and did not seek to be present at any court proceedings involving Charles Medico and have not gone to the original source for any of the

[6] Moreover, the analysis of the court of appeals in this case does not purport to be limited to judicial or quasi-judicial records. See Pet. App. 48a (Starr, J., dissenting); *id.* at 66a (Bork, Starr, Buckley & Sentelle, JJ., dissenting).

information they seek. Nor has the federal government sought to prevent them from publishing any information that they have obtained.

This case is about the important question whether the federal government will be made into an *additional*—centralized—source for otherwise obscure arrest records and court records, on the theory that despite their obscurity there is no nonnegligible privacy interest in them because they are available somewhere. As the amicus brief filed by the States of California and New York demonstrates, one can rationally find it acceptable to invade a person's privacy to the extent of keeping his arrest or court records available at their original source, but not to invade his privacy to the much greater extent of making many such records, compiled in one central location, available to "any person" (5 U.S.C. 552(a)(3)) on demand. As amici further demonstrate, the distinction between raw data and compiled data is not adequately answered by the blithe suggestion (Br. in Opp. 13) that the data should not be compiled by the government in the first place. Information sharing by local, state, and federal law enforcement authorities is meant to aid enforcement of the laws, a goal that neither supports release of information to the general public nor becomes illegitimate just because of a refusal to release compiled information to the general public.[7]

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[7] Respondents' assertion that we are seeking to "distort[]" the concept of privacy "as a surrogate for separate legislation" (Br. in Opp. 13) is far off the mark. Regardless of whether privacy concerns may prompt further legislative protections against disclosure of criminal records, such concerns have already prompted Congress to provide the broader protections of Exemptions 6 and 7(C) of FOIA, to be applied by judicial balancing in a wide variety of contexts. It is the court of appeals, in its artificial narrowing of the concept of privacy under these exemptions (Pet. App. 16a-19a), that has attempted judicial legislation.

d. Respondents contend that the court of appeals' privacy analysis is confined by that court's definition of "public record" (Br. in Opp. 9-10) and its disclaimer that its result might be different if there were a particularized showing of harm (*id.* at 11). Neither statement imposes a workable limitation, and neither is based on FOIA.

The court's redefinition of the phrase "public record" (Pet. App. 20a, 42a) to require an understanding of the practices of the originating jurisdiction would impose on the federal government a serious burden that is not justified by the statute that the court purported to interpret. As Justice Brennan has observed, "FOIA [does not] compel[] the Government to conduct research on behalf of private citizens." *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 159-160 n.2 (1980) (Brennan, J., concurring in part and dissenting in part); see also *id.* at 152 (opinion of the Court). The court of appeals' definition of "public record," which certainly cannot be found in FOIA or its legislative history, would apparently require agencies both to examine and to evaluate the practices of other governments before the court will uphold the nondisclosure of any arrest record. This aspect of the opinion below is not a saving grace but a serious distortion of the law (see Pet. 19-21 & n.10).

Equally unhelpful and incorrect is the court's demand (Pet. App. 40a) that particularized harm be shown before federal release of a "public record" will be deemed to invade privacy any more than slightly. First, this analysis is directly contrary to the words of the statute, which exempt from mandatory disclosure those law enforcement records whose disclosure "*could reasonably be expected* to constitute an unwarranted invasion of personal privacy" (5 U.S.C. (Supp. IV) 552(b)(7)(C) (emphasis added)). Second, this analysis is contrary to common sense. No person wants his arrest record disseminated to any and all

persons who ask the federal government for it. There is no warrant to deride that desire, which is an aspect of privacy, as insignificant in the absence of more particularized showings of harm. See *Miller* v. *Bell*, 661 F.2d 623, 629 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982); see also *Plain Dealer Pub. Co.* v. *United States Dep't of Labor*, 471 F. Supp. 1023, 1028 (D.D.C. 1979).

3. As to the "public interest" side of the balancing test, respondents have conceded (Br. in Opp. 5-6, 18) that the court of appeals erred in ruling that there is no way, or need, to weigh the public interest in disclosure of particular documents, and we have already responded to their assertion that the error makes no difference to the outcome of this case. We do, of course, dispute respondents' wholly inaccurate characterization of this case as one in which we seek only clarification of the law of the District of Columbia Circuit (*id.* at 14, 16). The decision below conflicts not only with cases from that court of appeals, which the panel repudiated (Pet. App. 37a & n.1) and the en banc court did not revive (see *id.* at 64a-66a), but also with cases from at least seven other circuits (see Pet. 23 n.13), a fact that respondents ignore.

In addition, we dispute respondents' contention (Br. in Opp. 16) that this decision is likely to be limited to cases involving criminal records, a limitation the panel certainly did not intend (see Pet. App. 37a-40a (citing many cases not involving criminal records)).[8] Indeed, the Third,

[8] *Washington Post Co.* v. *United States Dep't of State*, No. 84-5604 (D.C. Cir. Feb. 5, 1988), which respondents discuss (Br. in Opp. 15), does nothing to support their contention that the decision in this case will be so constrained. The *Washington Post* court engaged in no substantive discussion whatever of the "public interest" part of the balancing test; its discussion concerned the interests on the other side (see slip op. 8).

Seventh, and Eighth Circuits have already considered the applicability of this part of this decision to other kinds of records, and, although only the Seventh Circuit has followed it rather than distinguished it, no court has distinguished it on the ground that it is limited to criminal records. See *United States Dep't of Navy* v. *FLRA*, No. 87-3005 (3d Cir. Mar. 2, 1988), slip op. 12 n.2; *United States Dep't of Air Force* v. *FLRA*, 838 F.2d 229, 233 (7th Cir. 1988); *United States Dep't of Agriculture* v. *FLRA*, 836 F.2d 1139, 1143 n.3 (8th Cir. 1988).[9]

Furthermore, unless and until this decision is reviewed and overturned, federal agencies must assume that it means what it says and must take account of the fact that their FOIA determinations may be reviewed (as all FOIA decisions may be under 5 U.S.C. 552(a)(4)(B)) in the United States District Court for the District of Columbia, where this decision is binding precedent. Thus, even respondents' view of this case as one involving only an error in the application of the law of the District of Columbia Circuit is not a persuasive basis for denying review.

[9] We do not understand how respondents can read the Seventh Circuit's decision as standing only for the narrow (and correct) proposition that the identity of the requester is irrelevant to the "public interest" that is to be considered under FOIA (Br. in Opp. 15-16 n.6). The court stated: "We agree with *Reporters Committee* * * *: 'We do not believe that the phrase "public interest" as used in the balancing in Exemptions 6 and 7(C) of the Act, means anything more or less than the general disclosure policies of the statute. * * * [W]e do not believe Congress intended the federal judiciary * * * to construct its own hierarchy of the public interest in disclosure of *particular information*.' " 838 F.2d at 233 (emphasis added).

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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